

Before the
Federal Communications Commission
Washington D.C. 20554

In the matter of

2002 Biennial Regulatory Review – Review of
the Commission’s Broadcast Ownership Rules and
Other Rules Adopted Pursuant to Section 202 of
the Telecommunications Act of 1996

MB Docket No. 02-277

REPLY COMMENTS OF THE NETWORK AFFILIATED STATIONS ALLIANCE

The Network Affiliated Stations Alliance (“NASA”), a coalition representing some 600 local television stations affiliated with the ABC, CBS, and NBC Television Networks, submits these reply comments in connection with the Media Bureau’s Notice requesting comment on the effect, if any, of Section 629 of the Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3 (2004), on the Commission’s authority to modify the UHF discount.¹

NASA’s initial comments explained that Section 629 does not affect the Commission’s authority to implement its decision to sunset the UHF discount for the major networks following the digital transition, and that the enactment of Section 629, if anything, suggests that Congress approved the Commission’s sunset decision. NASA’s comments also showed that a contrary reading of Section 629 would undermine the integrity and effectiveness

¹ *Public Notice* in MB Docket No. 02-277, DA 04-320 (rel. Feb. 19, 2004).

of the 39 percent national ownership limit imposed by Congress, because it would allow the networks to acquire many additional television stations as soon as the digital transition occurs. The networks appear to concede that Section 629 does not divest the Commission of the authority to modify the discount in the future and urge the Commission to reconsider its sunset decision in light of the new legislation. The concerns they raise about possible divestitures of network-owned stations do not warrant reconsideration of the Commission's decision to sunset the UHF discount for them, as the Commission could fully address any such concerns, while preserving the integrity of the 39 percent cap, by grandfathering existing station combinations on a case-by-case basis.

I. DISCUSSION

A. Section 629 Does Not Divest The Commission Of Authority To Sunset The UHF Discount For The Four Major Networks.

1. The Consolidated Appropriations Act, 2004 expressly directs the Commission to change the ownership limit in its national television ownership rule from 45 percent to 39 percent. The statutory language does not direct the Commission to change (or not change) any other aspect of the national television ownership rule. Nor does it reverse the Commission's decision to phase out the UHF discount for the big four networks at the time of the digital transition, a decision with which no Commissioner disagreed.² See NASA Comments at 5-6.

² The Commission's sunset decision applies to "the stations owned by the top four broadcast networks (i.e., CBS, NBC, ABC and Fox)." *2002 Biennial Review Order* ¶591. Contrary to Paxson's arguments, the Commission did not exempt from its decision to phase out the UHF discount stations owned by the four major networks that are not affiliated with those networks. Compare Paxson Comments at 13 n.20 with *2002 Biennial Review Order* ¶591.

In directing the Commission to make a specific change to its national television ownership limit (from 45 percent to 39 percent), it was natural for Congress to use terms of the Commission's regulation, including the term "national audience reach limitation," in order to describe the aspect of the Commission's ownership regulations Congress wanted the Commission to alter. It does not follow, however, that Congress's use of the phrase "national audience reach limitation" was intended to freeze the meaning of this term forever. As NASA's initial comments explained, principles of statutory interpretation, such as the presumption against repeals by implication and the presumption that Congress knows the law and therefore was aware of the Commission's sunset decision when Section 629 was enacted, compel the opposite conclusion. *See* NASA Comments at 6-9.

2. Moreover, the Commission is already on record that Congress's use of the phrase "national audience reach limitation" in the Telecommunications Act of 1996 did not divest it of authority to modify the UHF discount under its general rulemaking powers. *See* In the Matter of Broadcast Television National Ownership Rules, *Notice of Proposed Rulemaking*, MM Docket Nos. 96-222, 91-221, 87-8, FCC 96-437, 11 FCC Rcd 19949, 19950 (Nov. 7, 1996); In the Matter of 1998 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Biennial Review Report*, MM Docket No. 98-35, FCC 00-191, 15 FCC Rcd 11058, 11079 (June 20, 2000). Had Congress sought to divest the Commission of authority to modify the UHF discount in Section 629 or reverse the Commission's decision to sunset the UHF discount for major networks, it would have said so expressly. But Congress did not. Rather, Congress simply modified the 1996 Act by directing the Commission to set the television

ownership cap at 39 percent of the national viewing audience and exempting rules relating to the 39 percent limitation from the quadrennial review process. *See* NASA Comments at 5-6.

3. Commenters arguing that Congress’s use of the phrase “national audience reach” demonstrates that Congress has approved the existence and continued use of the UHF discount largely ignore these points. Once the Commission issued its *2002 Biennial Review Order*, there was no “settled” or “longstanding” agency position in favor of retaining the UHF discount. Instead the Commission’s position was that the UHF discount should sunset for stations owned by the four major networks on a market-by-market basis as the digital transition occurs.

As explained in NASA’s initial comments, the lines of authority these commenters invoke in support of their position – that repetition of statutory language with well-settled administrative or judicial interpretations in a new statute suggests an intent to incorporate the administrative and judicial interpretations as well, and that longstanding administrative interpretations, applying to a substantially re-enacted statute are deemed to have received congressional approval – do not suggest that Section 629 operates to freeze the UHF discount in place. *See* NASA Comments at 8-9. In any case, the proponents of these arguments appear to concede that the Commission retains authority to “revisit” its decision to sunset the UHF discount in the future, and that Section 629 does not force the Commission to retain the UHF discount for all station owners at all times. *See, e.g.,* Fox Comments at 10-12 (urging the Commission to reconsider its decision to sunset the UHF discount in light of the 39 percent limit imposed by Congress); Paxson Comments at 15-16 (same).

4. That bills which would have directed the Commission to phase out the UHF discount immediately or on a specific time frame did not pass should not alter the

Commission's conclusion that it retains authority to implement its sunset decision. As a general matter, failed legislative proposals are entitled to little weight in statutory interpretation. *See Wright v. West*, 505 U.S. 277, 295 n.9 (1992) ("Our task... is not to construe bills that Congress has failed to enact, but to construe statutes that Congress has enacted."). As the legislative history surrounding Section 629 clearly shows, Congress's overwhelmingly negative reaction to the Commission's decision to relax the national television ownership rule was rooted in its concern that a 45 percent limit would allow the major networks to further consolidate their hold over broadcast television to the detriment of localism interests. *See* NASA Comments at 3 & n.6. Thus, Congress may well have decided that these bills were unnecessary, given the Commission's unanimous decision to phase out the UHF discount for the major networks.³

B. The Networks' Concerns About Possible Future Divestitures Do Not Warrant an Interpretation of the 2004 Legislation That Would Undermine the 39 Percent Cap and, In Any Event, Can Be Fully Addressed By Grandfathering Existing Station Combinations.

1. Because most of the broadcast television stations owned by the big four networks are VHF stations in the analog world, and most of these VHF stations have been assigned "in core" UHF signals in the digital world, the effectiveness of the 39 percent limit imposed by Congress would be eviscerated if the UHF discount does not sunset for the major networks following the digital transition. *See* NASA Comments at 10-11 & Attachment 1 (chart showing the television stations owned by companies associated with the big four networks). If the big four networks continue to broadcast their DTV signals over the "in core" UHF channels they have already been assigned, they will become eligible to acquire many additional television

³ Other aspects of the legislative history surrounding Section 629 indicate that Congress purposefully chose not to codify the UHF discount. *See* Hearst Comments at 4-5.

stations as soon as the digital transition occurs, contrary to the plain intent of the 2004 legislation to limit further acquisition by the networks. NASA Comments at 11.

2. Fox, NBC, and Viacom urge the Commission to reconsider its decision to phase out the UHF discount for them, arguing that the underlying assumption of the Commission's sunset decision – that the cap would be set at 45 percent – no longer exists and would result in forced divestitures. But the Commission did not say its purpose in sunseting the UHF discount was avoidance of divestitures.⁴ Rather, it said that its decision was based on the fact that “the digital transition will largely eliminate the technical basis for the UHF discount because UHF and VHF signals will be substantially equalized.” *2002 Biennial Review Order* ¶591. In any event, the issue of possible divestitures is more appropriately handled by grandfathering existing station combinations on case-by-case basis, rather than reversing course on the sunset decision. Grandfathering existing network-owned stations would leave existing station combinations intact while preserving the integrity of the 39 percent cap.

3. Fox, NBC, and Viacom also complain that the Commission's sunset provision is unjustifiably “discriminatory.” Fox Comments at 11. But, again, this is not so. The Commission explained that retaining the discount for other station group owners promotes entry of new broadcast networks, making differential treatment appropriate. The Commission also concluded in the *2002 Biennial Review Order*, and Congress agreed, that localism – specifically the networks' incentive to prefer their own programming over serving the tastes and needs of

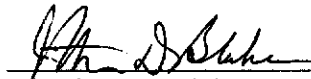
⁴ Contrary to the networks' suggestion (*see* Fox Comments at 10), moreover, phasing out the UHF discount under a 45 percent cap would not have precluded the possibility of divestitures. Without the UHF discount, Viacom's current audience reach is already greater than 45 percent. *See* NASA Comments, Attachment 1.

their local communities – justifies continued retention of a national television ownership rule.

Thus, if there is any discrimination that should be reassessed by the Commission, it is in applying the cap to group owners not associated with the big four networks.

Respectfully submitted,

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